Tuesday, October 26.

FIRST DIVISION.

CARTER (PENDREIGH'S TRUSTEE) *v.* M'LAREN & CO.

(See *Ante*, vol. vi., p. 606.)

Bankruptcy Act—Creditor—Discharge—Forfeiture—Good Cause—Penalty—Preferential Payment. B. & Co., creditors of C. & Co., refused to agree to the offer of composition made by the latter when sequestrated; but, being pressed by some of the other creditors to accept a preferential payment and give their consent, they eventually did so, on the understanding that the additional payment was to be made by the friends of C. & Co., and not by any of the creditors. They openly stated what they had done; and, on learning that the transaction was illegal, at once refunded the money. *Held* (diss. LORD KINLOCH) that their conduct throughout showed the transaction had been neither secret nor collusive; and that the forfeiture and penalty which sec. 150 of the Bankruptcy Act imposes, unless good cause is shown to the contrary, ought not in the circumstances to be inflicted.

J. & G. Pendreigh carried on business as grain merchants in Edinburgh and Leith, and as brewers at Abbeyhill, Edinburgh; but the firms were different—the partners being different—and the creditors of each firm were different. The estates of each firm were sequestrated, and Mr Carter, the petitioner, was elected trustee in each sequestration. At a meeting of the creditors on 27th April last, the bankrupts made offer of a composition of 3s. 7½d. per pound on the debts of each estate—it being understood that for this purpose the two estates should be massed in one.

The respondents, who were creditors of the grain firm only, refused to accede to this composition, believing that the estates, if properly worked, should yield a dividend of 10s. per pound, and that the massing of the two estates was illegal. As they were overruled, and the composition accepted, they brought an action of reduction of this agreement, and succeeded in getting it set aside.

Meanwhile, as the other creditors were anxious for an immediate settlement, the respondents were pressed to accept a composition on their debt of 10s. per pound. They however refused to receive any sum that came out of the pockets of the creditors, but expressed their readiness to agree to 9s. per pound if the 1s. 9d. per pound of difference was paid by the Pendreighs' friends. On receiving an offer of this sum, amounting, after deduction of 2½ per cent. discount, to £226, 9s. 3d., through a Mr Weir, they, on 12th May, acceded to the offer.

The respondents made no secret of this agreement, openly telling it to other creditors and merchants. Hearing, however, that it was objected to, they, on 22d May, printed and issued a circular, with a copy of their correspondence in the matter, in which they stated—"We were informed that an opinion had been expressed that our object in opposing a private settlement was to do injury to some of the younger houses who are creditors, and it was for the purpose of disproving such an unfounded charge that we agreed to take 9s. per pound, provided that composition came from the Pendreighs, or their friends, not being creditors, although we declined to take the larger composition of 10s. per pound, which was offered to us by certain creditors. We entertained a decided opinion that the estate, if even then wound up by the trustee, would have yielded at least 9s. per pound, and we believe that a considerably larger dividend would have been realised if the estate had been at once sequestrated and promptly wound up by the trustee."

On 25th May they returned the money to Mr Weir, having been informed that their acceptance of this sum was illegal, as by section 150 of the Bankruptcy Act it is provided that "all preferences, gratuities, securities, payments, or other consideration not sanctioned by this Act, granted, made, or promised, and all secret or collusive agreements and transactions for concurring in, facilitating or obtaining the bankrupt's discharge, either on or without an offer of composition, and whether the offer be accepted or not, or the discharge granted or not, shall be null and void; and if during the sequestration any creditor shall have obtained any such preferences, gratuity, security, payment, or other consideration or promise thereof, or entered into such secret or collusive consideration, or agreement, or transaction, the trustee shall be entitled to retain his dividend, and he or any creditor ranked on the estate may present a petition to the Lord Ordinary or to the Sheriff praying that such creditor shall be found to have forfeited his debt, and be ordained to pay to the trustee double the amount of the preference, gratuity, security, payment, or other consideration given, made, or promised, and if no cause be shown to the contrary, decree shall be pronounced accordingly, and the sums which in such case may be recovered, shall, under deduction of the expenses of recovering the same, be distributed by the trustee among the other creditors under the sequestration."

The trustee, in consequence, presented this petition, praying for forfeiture by the respondents of their whole debt, and payment of double the amount of the preference received by them. The Lord Ordinary (MANOR) refused the petition, on the ground that good cause to the contrary had been shown; and, in the note to his interlocutor, completely exonerated the respondents from any moral delinquency or thought of fraud. His note concludes in the following terms:—"Had the proceedings in the sequestration been regular and in all respects legal and competent, there is hardly room for doubt that the respondents, by accepting a consideration for the withdrawal of their opposition to the offer of composition made by the bankrupts, would have rendered themselves liable to all the statutory penalties, notwithstanding the apparent good faith in which they acted, and notwithstanding the fact that they abandoned and paid back the consideration which they had so accepted the moment it was suggested to them that the acceptance of any such consideration was a contravention of the terms of the Bankruptcy Act. Ignorance of law plainly could not have excused them, and the words of the statute are so very broad as to strike at every species of private interference that may be resorted to for the purpose of facilitating or obtaining a bankrupt's discharge. If the facts are proved or admitted, it is irrelevant to inquire what the party intended, or whether he was aware of the consequences of his act. The penalties of the statute must ensue, *unless cause be shewn to the contrary.* But in this case the Lord Ordinary is of opinion that sufficient cause has been shewn. For the appeal taken by the respondents against

the resolution of the creditors to accept the offer of composition in the form in which it was made, has now been disposed of by the Court; and the result of the judgment pronounced by their Lordships of the First Division is to hold that the entire proceeding was irregular and incompetent, and not within the provisions of the Bankruptcy Act. That being so, there never was any statutory offer of composition for discharge, and, consequently, it is thought, there can be no infliction of penalties for interference with an arrangement which was not sanctioned or protected by the statute."

The petitioner reclaimed.

LORD ADVOCATE, GIFFORD and TRAYNER for the reclaimer.

DEAN OF FACULTY, SOLICITOR-GENERAL, and ASHER, for the respondents.

At advising—

LORD PRESIDENT—This reclaiming-note has been presented by the trustee in Pendreigh's sequestration against an interlocutor of the Lord Ordinary on the Bills, refusing to give effect to a petition which the trustee presented to him under the 150th section of the Bankruptcy Act of 1856. The petition set out that one of the defenders, after an offer of composition had been made by the bankrupts, 'entered into a secret and collusive agreement and transaction, whereby a preference gratuity or payment was granted, made, or promised to them for facilitating or obtaining the discharge of the bankrupts on their offer of composition;" and specially, it alleges that, in pursuance of that secret and collusive agreement, certain parties paid to this creditor, and this creditor accepted and received, the sum of £226, 9s. 3d., being 1s. 9d. per £1 on their debt, less 2½ per cent. discount, in addition to the composition that was to be paid to the other creditors. Upon that ground the trustee prays the Lord Ordinary to find that this creditor has forfeited the debt claimed on the sequestrated estate, and to ordain him to pay to the petitioner, as trustee, the sum of £452, 18s. 6d., being double the amount of the preference obtained. Now, it is needless to say that this is a proceeding of a penal character, and one must scrutinise and consider with great care the provisions of the statute and the allegations of the parties, and the proof which has followed upon them. It is a case of a very serious character. It is said by the Lord Ordinary—and, I think, not disputed by the reclaimer—that there is in this case really no moral blame attaching to the respondents at all. The offence which they have committed against the statute, in the view of the trustee, is, that they have done the thing forbidden under a mistake in point of law; and that, after they had discovered the mistake they had committed in point of law, they hastened to undo the thing that they had done. The dates are somewhat material in considering the facts of the case. The offer of composition was made by the bankrupts upon the 27th April last, and that offer was considered at a meeting of creditors on the same day. The creditor who is prosecuted under this petition, and another, intimated a protest at that meeting against the legality of the offer of composition in these terms:—"That the offer of composition is incompetent and informal, as there are two separate sequestrated estates, and the offer proposes that creditors on one estate shall rank and receive a dividend on both estates." Now that, undoubtedly, was a very formidable objection; and it has turned out, in point of fact, that it was a fatal objection; for in another proceeding the Court has given effect to that objection, and declared this composition to be incompetent. The parties who took this protest immediately thereafter left the meeting, and the meeting, in their absence, resolved to entertain the offer. Then certain persons approached the respondents Messrs M'Laren & Co., and the other protesting creditors, with a view to induce them to abandon their opposition to the composition, and the first letter of the series which is before us is by a Mr Weir, dated 30th April 1869, and the last important letter, I think, is the letter of Messrs M'Laren & Co., dated the 13th May 1869, in which it is at last distinctly arranged that, in consideration of Messrs M'Laren receiving 1s. 9d. per £1 through this Mr Weir, as an additional composition upon their debt beyond what was offered by the bankrupts, they are to withdraw their opposition to the approval of the composition. Now, it is needless to say that that was an illegal proceeding. Nobody disputes that. It is such a proceeding—giving a preference to one of the creditors over and beyond what the other creditors are to obtain—that the 150th section of the statute declares to be null and void. But then there comes a meeting of the creditors, on the 21st of May, which is called for the purpose of ultimately approving of the offer of composition; and the next step after that, of course, would have been to go to the Sheriff for the purpose of carrying through the bankrupt's discharge and putting an end to the sequestration in the form usual in cases of discharge upon composition. "The meeting having proceeded to the business for which it had been called, viz., finally to decide on the offer of composition made by the bankrupts at the meeting of 27th April, and the security proposed, the creditors present unanimously agreed to and accepted the said offer of composition, and approved of the security, and directed the trustee to proceed accordingly." Now the respondents were not present at that meeting. They did not actively engage at that meeting in promoting the discharge of the bankrupts or the ultimate acceptance of the offer of composition; but they abstained from going there to object, and undoubtedly that must be ascribed to the arrangement which they had made with Mr Weir, that they were to withdraw their opposition upon receiving the additional dividend of 1s. 9d. But although this is quite true so far, and there is no doubt that they entered into an arrangement which by the statute is declared to be null and void, they can hardly, with any propriety, be said to have entered into a secret and collusive agreement, as alleged in the petition. It was anything but secret and collusive, and it is not necessary to go over the proof for the purpose of showing that, for I entirely agree with the statement that the Lord Ordinary makes as to the import of that proof, when he says in his note:—"The respondents made no secret of this transaction, but long before any challenge of it was brought, or any hint given of its being illegal, they communicated it and spoke openly of it to several of the creditors, and to bankers, merchants, and other men of business, in the belief that it was perfectly legal and unobjectionable; and it was not until after the meeting of 21st May, at which the offer of composition had been accepted, that they heard that a number of the creditors were objecting to their conduct in having received more than the dividend of 7s. 3d." Now, when this came to their knowledge it is very important to observe what they did. The meeting

was held on the 21st May, and on the 22d of May, hearing that there was a talk about this arrangement that they had made, they seem to have been very anxious to make all the creditors aware of what it was precisely that they had done; and accordingly they printed a circular, dated the 22d May, and sent it round to all the creditors, distinctly announcing the object which they had in view, and the arrangement which they had made. They say, "We were informed that an opinion had been expressed that our object in opposing a private settlement was to do injury to some of the younger houses who are creditors; and it was for the purpose of disproving such an unfounded charge that we agreed to take 9s. per pound, provided that composition came from the Pendreighs or their friends, not being creditors, although we declined to take the larger composition of 10s. per pound, which was offered to us by certain creditors. We entertained a decided opinion that the estate, if even then wound up by the trustee, would have yielded at least 9s. per pound; and we believe that a considerably larger dividend would have been realised if the estate had been at once sequestrated and promptly wound up by the trustee." Along with this circular they sent to all the creditors a copy of the correspondence which they had had with Mr Weir, which distinctly disclosed everything that had been done between them. But then they came almost immediately after that to be made aware by their law-agent, as Mr M'Laren says in his evidence, that what they had done was an illegal thing altogether, and that they were placing themselves in a very false position, and in a position of great risk and danger, by what they had done. And therefore they resolved, as soon as they had received this advice, to do what they could to undo this unlawful transaction. And accordingly, on the 25th of May—that is, three days after the circular to which I have just referred, the respondents write again to Mr Weir, the party with whom they had transacted, saying, "Having ascertained that the transaction which you induced us to enter into to withdraw our opposition to Messrs J. & G. Pendreigh's settlement is illegal under the bankrupt statute, we beg to hand you enclosed our cheque p. £226, 17s. 4d. sterling, being the amount you gave us, with interest thereon at the rate of 5 per cent. per annum." Next day they issued another printed circular to all their creditors announcing what they had done. In that circular they say—"We find that the arrangement made by us is illegal, of which we were entirely ignorant, having been of opinion that we were justified in accepting the 9s. per pound, so urgently pressed upon us, and which dividend we considered that the estate would pay at least. We may add that we explained to several of the creditors the terms of the arrangement, so that they might be aware of them before the last meeting of creditors. As the previous correspondence showed, while we accepted this 9s. from the friends of the bankrupts not being creditors, we declined to accept of 10s. per pound offered us by a creditor through Mr Weir. We request your particular attention to Mr Weir's distinct testimony, that it was with great reluctance that we agreed to the settlement at all, and that we were persuaded to do so solely for the purpose of disproving that we had any desire to crush certain creditors, as had been falsely reported." Now, the important fact disclosed in this latter part of the correspondence is, that so soon as the respondents were made aware of the illegality of the transaction in which they had been engaged, they immediately departed from it, and did all that they could to undo the transaction, and to avoid all its consequences. One consequence had followed upon it which could not be undone. The composition had been unanimously accepted by the creditors at the meeting of 21st May. They could not undo that certainly, but they did all that was in their power to prevent that acceptance having any effect. They immediately took up their previous protest and objection against the composition, and appealed against the resolution of the trustee of 21st May, and against the deliverance of the Sheriff which had followed upon it, and in their appeal in this Court they succeeded in having it found that the composition proposed was illegal, the consequence of which was that the composition contract was not given effect to, and that the bankrupt did not receive his discharge. Now, the question comes to be whether, under these circumstances, the respondents have been guilty of the statutory offence prohibited in the 150th section of the statute. The first part of the section is a declaration of nullity. It provides that "all preferences, gratuities, securities, payments, or other consideration not sanctioned by this Act, granted, made, or promised, and all secret or collusive agreements and transactions for concurring in, facilitating or obtaining the bankrupt's discharge, either on or without an offer of composition, and whether the offer be accepted or not, or the discharge granted or not, shall be null and void;" and, as I said before, nobody doubts that the arrangement which was entered into between Messrs M'Laren and Mr Weir was an illegal transaction, which under this declaratory part of the clause is null and void. But then the statute proceeds:—"And if during the sequestration any creditor shall have obtained any such preference, gratuity, security, payment, or other consideration, or promise thereof, or entered into such secret or collusive consideration or agreement or transaction, the trustee shall be entitled to retain his dividend, and he"—that is, the trustee—"or any creditor ranked on the estate, may present a petition to the Lord Ordinary or to the Sheriff, praying that such creditor shall be found to have forfeited his debt, and be ordained to pay to the trustee double the amount of the preference, gratuity, security, payment, or other consideration given, made, or promised, and if no cause be shown to the contrary, decree shall be pronounced accordingly." Now, the question is, whether, under the circumstances that here occur, the trustee is entitled to prevail in the prayer of this petition, which is to give effect to this second part of the enactment—whether he is entitled to have Messrs M'Laren's debt declared to be forfeited, and to decree against them for payment of double the amount of the dividend of 1s. 9d. per pound which was secured to them under that arrangement with Mr Weir. It is certainly a question of very considerable nicety and difficulty, but it rather appears to me from the manner in which this second part of the clause is expressed that the statute contemplates that this petition shall be presented against a creditor who is standing upon his illegal preference. The form of expression is "if during the sequestration" he "shall have obtained," and the forfeiture and penalty is that he shall forfeit his debt, and pay to the trustee double the amount of that which he has obtained—that is to say, he is to forfeit to the trustee, for the benefit of the creditors, not only that which he has pocketed,

but as much again; and it appears to me a little doubtful whether that can be read as applicable to a case where, although an illegal transaction has been entered into, it has been abandoned and given up before any challenge has been brought. I think that is a little doubtful—I say no more—upon the general phraseology of this part of the statute. But then there are certain other words at the conclusion of this portion of the statute that I think, in that point of view, become all-material. The Court are to pronounce decree in terms of the trustee's petition, "if no cause be shown to the contrary." Now, what is the meaning of that? If a transaction is entered into which under the prior part of the clause is null and void, and if the trustee immediately presents a petition for the purpose of giving effect to the consequent forfeiture, how can any cause to the contrary be shown if the mere completion of the transaction which is declared to be null and void necessarily infers the infliction of the penalty? It is said that the cause which is to be shown to the contrary is that the transaction is not illegal; but that would be a very strange construction of this clause, because it begins by specifying that the transactions are illegal, it thereupon declares them to be null and void, and, following up that declaration of nullity, and applicable only to transactions which are under the statute null and void, it authorises the presenting of this petition. The petition cannot be presented except in a case where the transaction is null and void. Then, how can cause be shown to the contrary of the prayer of the petition being granted if the transaction is null and void, unless there may be some other defence offered by the respondent in the petition than a mere defence of not guilty—than a mere denial that the transaction is null and void? I confess I have not been able to see any answer to that argument, and I must say, at the same time, that I think the insertion of those words—if they bear the meaning which I attribute to them—is consistent with justice, and that no better illustration could be had of the necessity of some such qualification of this penal enactment than the case which is now before us. I think if we were to give effect to the trustee's petition we should be—of course, if the Act of Parliament requires it we must do it—but even then we should be—inflicting a very severe, far too severe, penalty upon the offence actually committed—the entire forfeiture of the respondent's debt, whatever its amount may be, and the payment over to the trustee of double obtained or promised the amount of the preference—that is to say, double the amount of that which is no longer in his pocket, but which has been given back to a third party, and over which he has no longer any control, and against which he has no claim. In the case of his having it in his pocket, it would be only refunding the £226 which he had obtained, and paying out of his own funds £226 more; but as the case stands, he must pay out of his own funds double £226. Therefore, upon the construction of this second part of the clause, I think it is in the power of the Court, not to modify the penalty—that is not the nature of the power left to the Court at all—I don't think there can be any modification of the penalty in any sense—but it is in the power of the Court to consider whether the party against whom this complaint is brought has any reasonable cause to show why the statutory penalty should not be enforced against him. I am confirmed still further in my view of the construction of this second part of the clause by a consideration of what I may call the third part of the clause; for it goes on to enact, "If the sequestration shall have been closed"—the portion of the clause that I have been dealing with is applicable to the case where the sequestration is still current, as in the present case; but now the statute goes on to deal with the case of the sequestration having been closed before the challenge is brought—"if the sequestration shall have been closed, it shall be competent to any creditor who shall not have received full payment of his debt to raise a multiplepoinding in name of the person who has obtained such preference, gratuity, &c., and on the value of the preference, &c., or amount of the sum paid, or consideration obtained, being ascertained, double such value or amount, together with the amount of the debt of the colluding creditor, shall be ordered to be consigned by him, and shall be divided among the creditors who were ranked, or who were entitled to be ranked in the sequestration, and have not received full payment of their debt." Now, in this part of the clause there is no opportunity whatever given to the erring creditor to show cause against his being made liable in the full penalty, and the reason for that appears to me to be obvious, because in the case of the sequestration having been closed, the creditor has received and gone away with his illegal preference, and the bankrupt has obtained his discharge. The whole mischief is done, and cannot be undone; and therefore it is, that without any inquiry, except as to the amount of the illegal consideration, he is bound to consign in Court, as the fund *in medio* in the multiplepoinding, double the amount of that illegal consideration, together with the amount of his debt, by which I understand, and I suppose everybody understands, the amount of the dividends that he has received upon his debt. But to that extent the statute is imperative. There is to be no consideration of whether he was right or wrong—no consideration of whether he had any excuse whatever to offer, because the whole mischief is then done. The end has been attained for which this illegal transaction was entered into. The bankrupt has got his discharge, and the creditor has got his illegal consideration for consenting to that discharge. But the present case stands in contrast to that; and therefore it is, I think, that these words were introduced into the second part of the clause, "if no cause be shown to the contrary." The position of a creditor here who is charged with this offence is in law a very singular one. He has done that which comes within the letter of the statute, which is by the statute null, and which draws after it certain penal consequences, so far as the creditor himself is concerned. He says he becomes suddenly, and for the first time, aware that he has committed this statutory offence, and the moment he becomes aware of it he not only expresses his penitence, but he makes restitution. He makes restitution to the fullest extent in this way, that he gives up by sending back the amount of the illegal consideration which he has obtained, and he resumes his attitude of resistance to the discharge of the bankrupt. He does therefore everything that is in his power to prevent any of the evil consequences resulting from this illegal proceeding, and he is successful in doing so. Now, it is a very curious question in law whether, in such circumstances, the statutory guilt is complete? In a statutory offence we have nothing to do with dole, as we have in cases of common law. If a statute declares that a certain thing shall entail

penal consequences, we cannot help it, however slight may be the moral blame attaching to the delinquent. But then comes a very serious question, I think, whether such penalties can ever attach where the evil consequences contemplated by the statute have not been attained and carried out—where, in short, the party who has been going against the statute stops short in the commission of the statutory offence, and gives it up, and not merely expresses his regret for having been led by mistake into such a position, but endeavours to undo, and succeeds in undoing, all the evil that he has done. I say that is a curious question in law, and presents itself to my mind as a somewhat novel one; but I don't think it necessary to solve it in the present case, because, as I said before, I think I find within the words of the second portion of the clause itself enough to enable me to give effect to the moral innocence of this party, and to the fact that the statutory offence has not been completed, so as to effect the evils contemplated by the statute as a good reason—a good cause shown—against the pronouncing of this decree for penalty. Upon that ground I arrive at the same conclusion that is expressed in the interlocutor of the Lord Ordinary; but I am bound to say that the narrow ground which his Lordship assumes in his note is not that which would have led me to this result. I have endeavoured to explain as clearly as I can the grounds upon which my opinion rests, which are certainly quite different from those of the Lord Ordinary.

Lord Deas—This is an application, under the 150th section of the Bankrupt Statute, against Messrs M'Laren & Co., for the penalties mentioned in that section as attaching to the obtaining, or the getting the promise to obtain, an illegal preference. It is not an application to declare a nullity of that which is done. The prayer omits that altogether, and is confined simply to a prayer for the penalties. The reason of that, I suppose, is that the parties complained of had themselves undone and nullified the transaction, so that it was unnecessary. Now, whatever may be done upon this application—whether the penalties are to be awarded or no—I think it right to say that one thing is clear, and seems to be admitted upon all hands, viz., that there is nothing in the transaction to affect either the personal or the commercial character of these gentlemen in the slightest degree. That may be so, however, and yet they may be liable in the penalties in the statute. There are various things mentioned in that section of the statute, any of which may infer the penal consequences. Amongst others, a secret and collusive agreement for a preference may be sufficient to infer those penalties, and if I were to deal strictly with this complaint I should be disposed to say that it is confined entirely to a complaint upon the ground of there having been a secret and collusive agreement for a preference. This is the only thing that is stated in respect of which the statute is said to have been contravened. I consider it pretty well settled that the relevancy of a complaint of this kind is to be dealt with very much with the strictness applicable to a criminal indictment, and I am not prepared to say that this complaint can be held a relevant complaint for the purpose of anything prohibited in that section of the statute, whether specified in the complaint or no. I am not prepared to affirm that, and if I were to go upon that strict view of the complaint, I should, upon that ground alone, have great difficulty in coming to a conclusion against the parties complained against; because, whatever may be said about this agreement, it seems impossible to hold that it was a secret and collusive agreement. The character of the agreement is peculiar. Although it may have been proposed on the part of the bankrupts, we know enough of the case to know that the proposal truly was on the part of the general body of the creditors. The general body of creditors were all anxious to carry through the arrangement they had made—were most anxious that it should not be opposed—and I have no doubt that nothing would have been more satisfactory to the general body of creditors than that Messrs M'Laren had got this preference, and that the general body of creditors had got the discharge that they wanted carried through. But was it secret or collusive? The question whether it was collusive must be determined by the evidence before us. It is quite plain, from what your Lordship has pointed out, that there was no intention on the part of Messrs M'Laren to keep it secret, for the very day after the meeting at which the composition was accepted, they ordered 300 copies of the correspondence to be printed and distributed among the creditors. It is quite plain, therefore, that they did not intend to have it kept secret. But was it secret? It is distinctly proved that on the 20th—the day before the meeting at which the offer of composition was agreed to—Mr M'Laren stated to Mr Robinow, one of the creditors, the arrangement that had been made, and desired him, if he thought proper, to explain it to the creditors at their meeting next day, before they had agreed to the offer of composition; and although Mr Robinow's name is not in the print, it appeared from the manuscript copy of the minutes of the meeting that he was present at that meeting, authorised by Mr M'Laren to tell the whole body of creditors that this arrangement had been made between him and the bankrupts. I do not know whether Mr Robinow explained it or no, but how that can be called a secret agreement it is difficult to see. I am not, however, disposed to rest upon that narrow and somewhat technical ground, because I am humbly of opinion that, suppose you hold the whole statute to be libelled on, the result would be substantially the same, and it is much better for all parties to take it so. I do not doubt that the statutory offence here was committed. I do not agree with the Lord Ordinary in his view that, simply because the proposition for a composition contract fell through, or rather was held to be illegal and incompetent under the statute, that prevents the statutory offence from having been committed. The statute applies to agreements for a preference whether effectual or not—whether the discharge was granted or not; and I think it should be applicable whether the discharge could have been granted or no. I think, therefore, that the statutory offence was committed, and if it had been properly libelled, it must have been so dealt with. But the question remains, What are the consequences of that? It is important to observe, as your Lordship has pointed out, that the section of the statute consists of two, if not three, parts. The first is an absolute enactment that any agreement or promise of that kind, or arrangement of that kind, shall be null and void. That is absolute. But it goes on to enact that over and above that it shall infer certain penalties—that is to say, a certain punish-

ment. It might be pecuniary, it might be penal servitude, or anything the Legislature choose to impose. It is a punishment over and above the nullity of the offence. The question is, is that absolute? We find attached to it the words your Lordship has referred to, which are not attached to the other part, viz., that we are to decern for these penalties if no cause be shown to the contrary. That is to say, supposing the thing which the statute makes illegal has been done, and to be annulled in consequence, we are only to decern for the penalties if no cause be shown to the contrary. It seems to me impossible to read that as an absolute enactment that these penalties are to follow if the thing has been done. The Lord Advocate was asked what meaning he attached to these words, and he made the only answer that he could have made—that they were to be held superfluous. I am not aware that that is a view that is easily admissible in the construction of any statute, but still more in the construction of a penal statute of this kind. The rule as to all statutes is that you are to give a meaning to every word in the statute if you can, and far more is that so when the penal statute says that although the thing has been done which is prohibited or declared illegal, you are still to consider whether there is any good cause for not enforcing it. And that is strengthened by attending to what your Lordship has properly called the third part of the section, where it resumes the imperative mood, and declares certain things to be absolute in certain circumstances. Therefore I am clearly of opinion that we have a certain discretion to consider here, notwithstanding the thing prohibited by the statute being done, whether these penalties or this punishment shall follow. I do not mean to go over the circumstances so fully and so clearly stated by your Lordship, but I am clear that we have the discretion, and if there can be a case in which; although the statute has been contravened and the offence committed, the penalty ought not to be enforced, I think, it is this case. And upon that ground, and that ground alone, I am humbly of opinion that, though we must have declared the nullity if we had been asked—which we are not —this is a case in which sufficient cause has been shown against the infliction of the penalties.

Lord Ardmillan—I have arrived at the same conclusion as that which your Lordships have now explained; and I have really almost nothing to add beyond expressing my concurrence.

I cannot adopt the particular ground of judgment stated by the Lord Ordinary in the close of his note. I think that the 150th section of the 19th and 20th Victoria, cap. 79, is applicable to the agreement and transaction complained of, and that the statutory offence was committed; and that accordingly the said transaction was illegal, and null and void in terms of the first part of the section. But I cannot read the section as giving to the serious penalties which may be awarded by the Court the same universality and inflexibility of application as attend the statutory nullity of the illegal transaction. I agree in thinking that the two parts of the clause are separable, and ought to be separately considered and enforced. The first part ends with the words "null and void;" and that part is conclusive of the nullity of the transaction challenged, which certainly was a transaction giving a preference in order to facilitate the bankrupt's discharge on a composition. In that part of the clause the words, "if no cause be shown to the contrary" do not occur. The nullity is declared absolutely. The second part of the clause proceeds to specify the penalties which, on petition by the trustee or a creditor, the Court shall award in respect of the ascertainment of each illegal transaction, "if no cause be shown to the contrary." Now I must attach a meaning to these words. The petitioners hold them to be superfluous, or at least as only meaning that the penalty shall be incurred, unless the fact is disproved. This is not, in my view, a reasonable construction of the words. It seems needless to say "the fact shall be followed by penalties unless the fact be disproved." It seems more than needless, it seems absurd, to say "the wrong-doer shall be punished unless the wrong has not been done." A construction of a penal statute tending to exclude all explanations of the conduct of the persons accused cannot be lightly adopted. The words in this clause cannot be fairly so read. The "cause to the contrary," which must be shown to avoid decree for the penalties in respect of a certain illegal transaction, assumed to have been proved, cannot be a cause negativing the transaction, but must be a cause qualifying the transaction. The effect of the construction of the clause which I have explained is, that the Court must consider the cause shown to the contrary. Since "if no cause be shown to the contrary, decree shall be pronounced" for the penalties, the converse must be that, "if cause be shown to the contrary," decree may not be pronounced, —the judgment, on the sufficiency of the cause to the contrary, resting with the Court.

In this view we have now, in the first place, to declare the transaction "null and void." Of that there can be no doubt. Indeed, that has been already accomplished. The transaction has been undone, and the money has been repaid. Then we are called on to consider whether "cause to the contrary" has here been shown, in respect of which cause this Court should abstain from imposing the penalties. I concur in holding that we have no power to alter or modify the amount of the statutory penalties if they are awarded. But we do not award them if cause has been shown to the contrary.

Now, without repeating what has been already so well explained, I shall only say that, looking to the whole facts disclosed by the documents and the evidence, I am of opinion, that though the respondents may have acted irregularly, erroneously, and injudiciously, they did not act dishonestly, or with intention to defraud, or in wilful violation of law. They were mistaken. But the integrity and the good faith of their conduct is unquestionable. I am not quite satisfied that the respondents acted "secretly and collusively" within the meaning of the statute, or within the meaning of the petition. I do not think they made any secret of what they did, or that they felt they were doing anything requiring to be concealed. But I am quite satisfied that their conduct in the whole matter, and as appearing from the whole evidence, was not such as to merit the very severe penalties of this clause of the statute. Nothing can protect from nullity the transaction itself. But the award of penalties does not follow necessarily and universally; and, under all the circumstances, I think that cause has been shown to the contrary. To convince us that the penalties have not been deserved by the parties against whom we are asked to award them, is, in my opinion, to show cause to the contrary; and

when sufficient cause has been shown to the contrary, then, if my reading of the statute is correct, we are entitled and bound to refuse to award the penalties,—which, I think, ought to be refused in this case.

Lord Kinloch—The facts of this case are fully ascertained. On 27th April 1869 an offer of composition was made in the sequestration of Messrs J. & G. Pendreigh, grain merchants, which, as the Court afterwards found, was an incompetent offer. The respondent, Mr David M'Laren, acting on behalf of his firm of David M'Laren & Co., objected to its incompetency at the first meeting of creditors called to consider it. Between that date and the date of the second meeting, on 21st May thereafter, being on or about 12th May, Mr M'Laren entered into an arrangement under which his firm was to receive a sum equivalent to 1s. 9d. per £ over and above the other creditors, as a consideration for waiving the objection. The arrangement was made, nominally with a Mr John Weir, but in reality with certain creditors interested in carrying through the composition, and with the bankrupts themselves, one of whom, Mr George Pendreigh junior, is proved to have advanced the money necessary to pay the preference, and which, amounting to £226, 9s. 3d., was paid to Messrs M'Laren & Co. on 13th May 1869.

In consequence of this arrangement, Messrs M'Laren & Co. withdrew their opposition to the offer of composition, which was unanimously accepted by the creditors at the second meeting, of 21st May 1869. Within a day or two thereafter Mr M'Laren was advised by his law agent that the arrangement he had made was illegal under the Bankrupt Statute, and on 25th May he returned to Mr Weir the money which he had received. Ultimately the Court held that the offer of composition was incompetent, and refused to approve it.

I entertain no doubt that the arrangement which was made by Messrs M'Laren, and under which the sum in question was received by them, formed the statutory offence struck at by the 150th section of the Bankrupt Statute, and inferred the statutory penalties enacted by that section. It seems to me clearly to come under more than one of the expressions used in the section. To go no further than one of these, it was a transaction of preference, engaged in for facilitating the bankrupts' discharge. It was the fruit of an agreement made apart from the general body of creditors, with one or more individuals of these, and with the bankrupts, and which in this way was, as I think, a "secret or collusive agreement" in the statutory sense. I give entire credence to the statement of Mr M'Laren that he was ignorant at the time that he was infringing the statute. But that the statute was infringed I cannot doubt. I cannot adopt the view of the Lord Ordinary, that because the offer of composition was incompetent, therefore there was no illegality in receiving a consideration to accede to it. To receive a consideration for waiving an objection to the competency of an incompetent offer, seems to me very clearly one form of the statutory offence, and by no means the least objectionable.

The question, therefore, and the only question in the case, is, whether the Court is bound to award the statutory penalties, or may acquit the respondents from these, in respect of the cancellation on the 25th May of the illegal transaction engaged in on the 12th of the same month? I would most willingly unite in following the last of these alternatives, if I thought that the statute left the Court any option in the matter. But I cannot so read the statute. I think the Court is bound to inflict the statutory penalties if it find the statutory offence to have been committed. Plainly there is no power conferred of mitigating the penalties if incurred; and the Court is shut up to the alternative of either imposing the penalties or finding them not incurred at all. With reference to the words, "if no cause be shown to the contrary," I cannot read them as bestowing on the Court a discretionary power of inflicting the penalties or not, according to the circumstances of the case. I think they simply mean that judgment shall go out for the penalties if the respondent do not make appearance to establish a valid defence.

The only valid defence which in my view of the statute could be established is, that the statutory offence was not committed. And in this question it is to be remembered, that to constitute the statutory offence it is not necessary that the composition, for accession to which the illegal consideration is promised, should be carried through by the bankrupt. By the express terms of the statute, the offence will be constituted by an agreement to give the proposed composition effect or facilitation, "whether the offer be accepted or not, or the discharge granted or not." It may be sufficient to avoid the statutory result to show that the offence was not completed, as if, before the arrangement was concluded, it was broken off; or perhaps, by a very lenient construction, if it was withdrawn from instantly afterwards, and before anything had been done on it. But I cannot consider the present case as involving such a state of fact. The agreement was fully concluded,—the money was paid in terms of it,—and the equivalent was given, by Messrs M'Laren abstaining from appearing at the second meeting of creditors, and allowing the bankrupts to obtain a unanimous acceptance of the composition. I cannot, however earnestly desirous to do so, reach any other conclusion than that the statutory offence was fully committed; and in such a case I am of opinion that, however inoperative the arrangement may have become, and whether by the force of events or its abandonment by the parties, the Court has no alternative but to award the statutory penalty. I have thought it right to state my view to this effect, not that the view can now have any influence in the determination of the present case, but because in so important a matter as the construction of a public statute, and in the prospect of after possible discussion in other cases, I have considered it to be my duty not to withhold my opinion.

Agents for Reclaimer—Waddell & M'Intosh, W.S.

Agents for Respondents—Murdoch, Boyd, & Co., S.S.C.

Tuesday, October 26.

SECOND DIVISION.

GLEDDEN *v.* MONCRIEFF AND GOWANS.

Submission—Terms of Agreement—Joint Minute. A reference was made to an arbiter of the true meaning and intent of an agreement for the construction of a viaduct. In the course of constructing the viaduct an accident happened, in consequence of which an action was